IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5966 OF 2004

M/s. Bhadani Associates ...Petitioner

Versus

Smt. Kamlini D. Ashar & Ors. ...Respondents

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Mr. N.H. Seervai, senior counsel and Mr. F.R. Rehimtulla with Mr. Yatin R. Shah for Petitioner.

Mr. Jokhim Rais with Mr. Rahul Chitnis with Ms. Meenakshi Mahashabde i/b M/s. V. Deshpande for Respondent No.1.

Mr. Janak Dwarkadas, senior counsel i/b Ms. Sanjana Ghogre for Respondent No.2.

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CORAM: B. H. MARLAPALLE, J.

DATED OF RESERVING THE ORDER : 11.04.2005

DATE OF PRONOUNCING THE ORDER : 03.05.2005

P. C.:-

1. Heard Mr. Seervai, the learned senior counsel and Mr. F.R. Rehimtulla with Mr. Yatin R. Shah for the Petitioner, Mr. Jokhim Rais and Mr. Rahul Chitnis with Ms. Meenakshi Mahashabde i/b M/s. V. Deshpande for Respondent No.1 and Mr. Janak Dwarkadas, the learned senior counsel i/b Ms. Sanjana Ghogre for Respondent No.2.

1A. Rule. Respondents waive service. By consent,

petition heard finally.

2. The petitioner has instituted Regular Civil Suit No. 468 of 2003 for declaration, injunction and other reliefs and an application at Exh.5 for temporary injunction in the said Suit was also filed. By an order dated 23.9.2003 the said application was rejected by the learned V Joint C.J.J.D. at Thane. The same order came to be challenged in Misc. Civil Appeal No. 191 of 2003 and by his judgment and order dated 26.2.2003 the learned III Ad-hoc Additional District Judge, Thane was pleased to dismiss the same. Hence, this petition praying to allow the application filed under Order XXXIX Rule 1 and 2 of C.P.C. for temporary injunction.

3. By an order dated 3.9.2004 reading as under, this petition was rejected summarily;-

> "Heard the counsel for the parties. For the reasons recorded by the appeal Court in paras 24 and 25 of the impugned decisions, no interference in exercise of writ jurisdiction is warranted. There is no infirmity for the reasons so recorded. Not a case for exercise of writ jurisdiction. Dismissed."

. The above order passed by this Court was carried in Civil Appeal No. 781 of 2005 which came to be allowed by the Apex Court vide its order dated 28.1.2005 reading as under;-

> "Leave granted.
>
> After some hearing, learned counsel for the respondents submit that the impugned order of the High Court be set aside and Writ Petition No. 5966 of 2004 be remanded to the High Court to be examined afresh on merits. In this view, while setting aside the impugned order and remitting the aforesaid writ petition to the High Court for its fresh decision in accordance with law, we make it clear that the grievance of the appellant would be examined by the High Court on merits and the appellant would not be non suited only on the ground of what is stated in paragraphs 24 and 25 of the Order of the Civil Court or on any other technicalities.
>
> The appeal is, accordingly, allowed and Writ Petition No. 5966 of 2004 is restored to be decided expeditiously by the High Court in accordance with law."

4. Consequently, this petition came to be restored for fresh decision on merits.

. When the petition came up for admission on 9.3.2005 it was agreed by the learned counsel for the respective parties that the petition could be decided at the admission stage and time was granted to file affidavits. Though the learned counsel for the respective parties had agreed to limit their arguments and complete it within a fixed time, the

arguments proceeded extensively and concluded on 11.4.2005. Voluminous documents have been filed by both the parties.

5. On 8.4.1988 an agreement between Mr. B.R. Ashar (the late husband of respondent No.1) and the petitioners for the sale of plot No. D-9 was entered into and the consideration fixed was at the rate of Rs.115/- per sq. ft. of the FSI admeasuring 1708.6 Sq.Mtrs. and referred to as the suit plot. An amount of Rs.24,00,000/- was paid to the landlord against the said agreement from time to time and some times in December, 1990 the plan submitted by the landlord to the Thane Municipal Corporation (for short "T.M.C.") for development could not be sanctioned because of some litigations. Vide his letter dated 20.12.1995 the landlord explained the delay in completion of certain formalities on account of pending litigations and assured to convene the suit property to the petitioners. The landlord expired on 17.12.1999 leaving behind him the present respondent No.1 (wife) and a son and a daughter. The landlord bequeathed all his properties to respondent No.1 who obtained the probate from this Court and got the properties transferred in her name. On 10.5.2001 the Memorandum of Understanding (for short "MOU") was executed between the petitioners and the respondent No.1 whereby it was agreed that both of them to carry

out the joint venture for development of another adjoining property with the petitioner bearing entire costs and out of the total constructed area, one third was to be handed over to the respondent No.1 free of cost and the remaining two third was to be kept by the petitioner for disposal/sale. In March, 2002, the petitioner purportedly noticed some digging work being carried out on the suit property and stop work notice was issued by the T.M.C. on 4.4.2002. The respondent No.1 executed the Power of Attorney in favour of her son on 4.5.2002 and in the same it was mentioned that an agreement for sale of plot No. D-9 between the landlord and the petitioners was valid and subsisting. Another stop work order was issued by the T.M.C. on 25.7.2002.

6. The petitioners initially moved Special Civil Suit No. 367 of 2002 before the C.J.S.D. at Thane for specific performance of the agreement dated 8.4.1998 (hereinafter referred to as the first suit) and also filed an application for temporary injunction at Exh.5. The respondent No.1 in her reply on 26.8.2002 disclosed for the first time that on 1.1.2002 an agreement was executed between her and the respondent No.2. The application for temporary injunction came to be rejected by the trial Court on 4.10.2002 and the said order was challenged in Appeal from Order No. 954 of 2002 before this Court. The

said appeal was disposed of in terms of the consent order dated 1.11.2002 and by referring all claims based on the agreement dated 8.4.1998 and the MOU dated 10.5.2001 (as modified) to the Arbitration of Mr. Justice Rege (retired). Mr. Justice Rege (retired) declined to be the Arbitrator due to prior commitments and therefore, by another order dated 13.1.2003 the arbitral claim came to be referred to the Tribunal consisting of Mr. Justice Halbe (retired), Mr. Justice Suresh (retired) and Mr. Justice Pandit (retired) was appointed by the parties and it was constituted on 1.3.2003. Consequently the arbitration proceedings commenced thereafter. However, prior to the constitution of Arbitral Tribunal and after Mr. Justice Rege (retired) had declined to be the Arbitrator, the petitioners filed Misc. Application No. 43 of 2003 before the Civil Judge, Senior Division at Thane for an interim relief pending the arbitration proceedings, under Section 9 of the Arbitration and Conciliation Act, 1996. The said application was rejected by the learned C.J.S.D. vide his order dated 5.4.2003. On 25.4.2003 the Arbitral Tribunal passed an order directing the deletion of respondent No.2 and one M/s. Ashar Builders and Developers as party respondents to the arbitration proceedings, upon their objection to the same on the ground that they were not parties to the sole arbitration agreement. In the said order, the

Arbitral Tribunal had observed that the petitioners may file separate suit for the reliefs against the respondents if the construction was proceeding further on the basis of the agreement dated 1.1.2002. The order dated 5.4.2003 passed in Misc. application No. 43 of 2003 came to be challenged by the petitioners in Appeal from Order No. 335 of 2003 and by an order dated 2.5.2003 the said appeal was dismissed by this Court. Public notices were issued by the petitioners in respect of the suit property on 24.5.2003, 26.5.2003 in the local newspapers by name "Thane Vaibhav", Free Press Journal" and "Navshakti".

7. On 20.6.2003, the petitioners filed Regular Civil Suit No. 468 of 2003 (hereinafter referred to as the second suit) for the declaration that the agreement dated 1.1.2002 between the respondents is illegal, null and void and not binding on the plaintiffs. They also prayed for injunction and other reliefs. A separate application for temporary injunction at Exh.5 was also filed in the said suit. The respondents had opposed the said application by filing reply. By his order dated 23.9.2003 the learned C.J.J.D. was pleased to reject the application at Exh.5 in R.C.S. No. 468 of 2003 and the said order was carried in Misc. Civil Appeal No. 191 of 2003 before the District Court. An application for interim relief under Order XXXIX

Rules 1 and 2 r.w. Section 151 of C.P.C. was filed in the said appeal on 27.11.2003 and the said application came to be rejected by the learned III Ad-hoc Additional District Judge on 26.2.2004. Hence, the said order dated 26.2.2004 passed in Misc. Appeal No. 191 of 2003 has been challenged in this petition. In short, the petitioners are praying for temporary injunction against the respondents restraining them from undertaking and/or carrying out any construction on the suit plot i.e. plot No. D-9 during the pendency of R.C.S. No. 468 of 2003 as well as the arbitral proceedings.

8. If regards be had to the order passed by the Apex Court on 28.1.2005 in Civil Appeal No. 781 of 2005, it is clear that the petitioner's grievance is required to be examined on merits and they would not be non suited only on the grounds of what is stated in para 24 and 25 of the impugned order passed by the lower appellate court or on any other technicalities.

9. The thrust of the arguments advanced by Mr. Seervai the learned senior counsel for the petitioners, has been that the petitioners are entitled for an order of temporary injunction against the respondents and as prayed for in the application filed under Order XXXIX Rule 1 and 2 in Misc. Civil Appeal No. 191 of 2003 as the arbitral proceedings

pending in respect of the claim arising out of the agreement dated 8.4.1988 and the MOU dated 10.5.2001 would not non suit the petitioners. The prayers pending before the Arbitral Tribunal cannot be, per se, confined to the relief of compensation/ damages. The respondent No.2 cannot be termed merely an agent of respondent No.1 and it was not allowed to be impleaded as party respondents in the arbitration proceedings. The purported agreement dated 1.1.2002 indicates that the respondent No.2 was required to bring financial investments of its own and carry out the construction of flats on plot No. A-8 on which the old plot No. D-9 has merged. The rejection of Misc. Application No. 43 of 2003 by the learned C.J.S.D. Thane could not come in the way of the petitioners in obtaining the order of temporary injunction against the respondents. The respondent No.2 is a builder/developer appointed by the respondent No.1 and the agreement dated 1.1.2002 is entered some times after June, 2002 and therefore, it is fabricated transaction only to defeat the claim of the petitioners to get the possession of plot No.D-9 (part of new plot A-8) for developing and undertaking the constructions.

. It was further submitted by the learned senior counsel that after the Supreme Court had issued notice dated 16.11.2004 in the decided appeal the

respondents clandestinely proceeded to enter into agreements with third parties for sale of the proposed flats and receive pre dated cheques which were encashed after few months. This was done to stop or defeat the prayer for interim relief. The affidavit filed by the petitioners before the Supreme Court on 24.12.2004 specifically pointed out that no construction work was being carried out on the suit properties and while this petition was restored and was pending for disposal as per the order of the Supreme Court, the respondents had proceeded to enter into an agreements with the third parties only to defeat the order of temporary injunction for carrying out any construction activities on the suit plot, urged the learned senior counsel.

10. To counter the arguments advanced by the petitioner, the submissions of the respondents are almost on the same lines and they could be summarised as under;

a) The suit plot No. D-9 has merged with suit Plot No. A-7 as stated in the plaint itself and the construction on plot A-7 has already completed. The claim for temporary injunction of construction to be undertaken on plot No. A-8 has not been set out either in the plaint or in the application filed under Order XXXIX Rule 1 and 2 in the lower appellate Court.

b) Plot No. D-9 does not exist as at present on account of its merger with plot No. A-8 and therefore, the plot which was the

subject matter of original agreement dated 8.4.1988 does not exist.

c) The prayer for interim injunction has been rejected in Special Civil Suit No. 367 of 2002, Misc. Application No. 43 of 2003, RCS No. 468 of 2003 and finally in Misc. Civil Appeal No. 191 of 2003. Appeal from Order No.954 of 2002 and 335 of 2003 were also filed before this Court and no relief was granted in favour of the petitioners. Under such circumstances, the prayer for interim injunction pending Misc. Civil Appeal No. 191 of 2003 cannot be entertained.

d) Arbitral proceedings are pending and the petitioners may apply to the Arbitral Tribunal for interim relief and in any case, the petitioners claim for compensation/damages could be adjudicated upon in the arbitral proceedings and therefore,there is no irreparable loss to the petitioners.

e) Building permissions have been obtained. The construction activities are in progress and third party interests have been created and therefore, the application for injunction cannot be considered at this juncture, more particularly, on account of the pendency of the Civil Suit challenging the legality of the agreement dated 1.1.2002.

f) The petitioners cannot seek injunction against the respondent No.2 who has already started constructions as a developer because the said respondent is not a party to the original agreement dated 8.4.1988. The suit agreement is for a larger area of Plot No.A-8, which is not a subject matter of challenge in the first suit.

g) The petitioner was aware of the transactions entered between the respondents for carrying out constructions on plot No. A-8 vide agreement dated 1.1.2002 and the petitioner was present for the "Bhoomipoojan" ceremony to start the construction activities on the suit property. The petitioner kept mum even when this Court had referred, by consent order, the dispute covered by special Civil Suit 367 of 2002 for arbitration. It is too late for the petitioner now to claim the relief of temporary injunction.

h) No prima facie case has been made out to hold that the agreement dated 1.1.2002 entered between the respondent Nos. 1 and 2 is illegal, fabricated or otherwise ante dated. The said agreement is bonafide transaction and plot No. A-8 (5135.60 Sq. Mtrs) is much larger area than the plot No. D-9 (1708.6 Sq. Mtrs. or 21500.28 Sq. Ft. F.S.I.)

i) This being a writ petition filed under Article 227 of the Constitution, this Court cannot consider the prayer for interim injunction, unless it is held that the impugned order passed by the lower appellate court is perverse or manifestly erroneous or has resulted in irreparable loss to the petitioner and no such case has been made out by the petitioner for causing interference.

11. In R.C.S. No. 468 of 2003 (the second suit) the petitioner has prayed for, as noted earlier, a declaration that the purported agreement dated 1.1.2002 executed between the defendants is illegal, null and void and not binding upon the plaintiff. In addition, the petitioner has prayed for the perpetual injunction restraining the defendants from carrying out any development in or upon the suit property and/or putting up any structures thereon and/or creating any third party interests of whatsoever nature in regard to the suit property. By way of interim relief the petitioners prayed for temporary injunction from carrying out any development or construction activity and from creating any third party interest in regard to the suit property. In Misc. Civil Appeal No. 191 of 2003 the substantial

relief was to set aside the order passed below Exh.5 in R.C.S. No. 468 of 2003 and to allow the said application for temporary injunction. In the application filed under Order XXXIX Rule 1 and 2 of C.P.C. filed in Misc. Appeal No. 191 of 2003, the petitioner has prayed for temporary injunction pending the appeal. The scope of this petition is thus limited only to temporary injunction pending the appeal before the lower appellate court and therefore, it is necessary to examine whether the petitioner has made out a prima facie case to grant such relief at this juncture, by way of interim injunction or a status quo order regarding the constructions activities purportedly commenced on the suit property which is a part and parcel of plot No. A-8.

. The technicalities as raised by the respondents, alone would not come in the way of considering the challenge to the impugned order and the claim of the petitioner is required to be decided on merits as well.

12. The suit property has been named as plot No. D-9 admeasuring 1708.6 sq. mtrs forming part of the larger property admeasuring about 24462 sq. mtrs located in survey No. 418 Hissa No.2 (part), Survey No. 422, Hissa No.2 (part), survey No. 423, Hissa

NO.2 (part), Survey No. 425, Hissa No.1-B (part), survey No. 448, Hissa No.1 (part), Survey No.428, Hissa No. 1-B (part), survey No. 448, Hissa No. 1 (part), survey No. 443, Hissa No.1 (part), 3 (part) and 4 (part), survey No. 484 and survey No. 423, Hissa No.3 (Part) of village Panchpakhadi, Tq. and District Thane and now within the local limit of T.M.C. The boundaries of the said plot have been shows as under:-

On or towards North	- Plot No. D-8,
On or towards South	- 40 Ft. wide proposed road,
On or towards East	- 40 Ft. wide road,
On or towards West	- Plot No. 10 and 11

13. It is true that in prayer clause 25(a) of the plaint, the petitioner has described the suit property as plot No. D-9/A-7 admeasuring 1708.6 Sq. mtrs. However, this cannot be considered in isolation. In para 12 of the plaint, it has been contended that in the written statement filed in Special Civil Suit No. 367 of 2002, the defendant No.1 had stated that the suit property has extinguished inasmuch as there was no plot bearing No. D-9 as described in the said agreement in existence, that the activities were going on plot No. A-7 out of the said larger property. It is further

stated that the comparison of the sketch annexed to the said agreement dated 8.4.1988 and the sketch relied upon by the defendant No.1 in Special Civil Suit NO. 362 of 2002 would show that the same suit property which was earlier bearing No. D-9 has now been re-numbered by them as their own as plot No. A-7. Therefore, either there is a typographical mistake in mentioning the new plot number or the petitioner has mistaken plot No. A-7 as the suit property on the basis of the averments made in the written statement submitted by the defendant No.1 in Special Civil Suit No. 367 of 2002. This error could not, by itself, defeat the claim of the petitioner. There is no dispute that the original plot No. D-9 is the suit property and it is merged with plot No. A-8. The suit property is, therefore, part and parcel of the new plot No. A-8 which admeasures 5135.63 Sq. mtrs and the suit claim is in respect of the area admeasuring 1708.6 Sq. Mtrs from the same larger area.

14. In this Writ Petition, by the earlier order dated 3.9.2004 quoted in para No.3 above, the claim made by the petitioner was rejected for the reasons recorded in para No.24 and 25 of the impugned order. It would be appropriate to set out the observations made by the lower appellate court in para Nos.24 to 28:-

24. Advocate for the plaintiffs vehemently argued that the defendant no.2 in the present matter is not the party to the Arbitral Proceedings as his name has deleted by Hon'ble Arbitral Tribunal at the instance of defendant no.2, by order dtd. 25.4.2002. On this point learned Advocate for the defendant rightly submitted that Hon'ble High Court dismissed appeal NO. 335 of 2003 filed by the plaintiffs against the order passed by Civil Judge, S.D. Thane, in M.A. No. 43 of 2003 filed on 2.5.2003. So plaintiff ought to have raised this point before Hon'ble High Court in above said appeal from order No. 335 of 2003 but it was not raised. So it is not open for the plaintiff to claim relief or temporary injunction against defendants on the ground of above said submission.

25. Further, it appears from pleadings of the plaintiff itself that efficacious remedy is available to the plaintiff before the Hon'ble Arbitral Tribunal as in para 11 of application Exh.5 the plaintiff contended that a bare perusal of the suit agreement will disclose that the defendant No.1 has not totally withdrawn from the development activities. Clause No.2 of the suit agreement clearly states that the development was to be done by both the defendants jointly in the manner more particularly stated in the suit agreement. The text of the suit agreement will make is crystal clear that the same was more in the nature of joint venture. The status of the defendant No.2 as per the suit agreement was simply that of an agent and/or a person claiming through the defendant No.1. Advocate for appellant/plaintiffs also argued that plain reading of suit agreement disclosed that no any independent right is created in favour of defendant No.2 by virtue of suit agreement but it is only in nature of joint venture.

26. I have gone through the copy of suit agreement produced on record and found substance in the above said pleading and submission of plaintiff's advocate. If this is the position, then naturally if the plaintiff approached the Hon'ble Arbitral Tribunal for temporary injunction, as claimed in this proceeding, and succeeded to get it then naturally it would have been efficacious of the said proceedings. Because defendant No.2 as per the submission of the plaintiff itself and also appears from suit

agreement not derive any independent right or interest in suit property by virtue of said agreement which is in nature of joint venture.

27. It is crystal clear from above discussion that the plaintiff sought identical relief for temporary injunction against defendant in two earlier proceedings i.e. in Special Civil Suit No. 367 of 2002 and in Misc. Application No. 43 of 2003 filed in the Court of Civil Judge, S.D., Thane but same was not granted. In both rounds of litigations the plaintiffs approached to the Hon'ble High Court but the order passed by the Civil Judge, S.D., Thane in above said proceeding remained intact. Further in Appeal from Order No. 335 of 2003, preferred by the plaintiffs against order of Civil Judge, S.D., Thane passed in Misc. Application No. 43 of 2003 Their Lordships while dismissing said appeal held that the appellant, if so entitled to in law would be entitled to move arbitral tribunal as now constituted. It will be open to the arbitral tribunal to consider the case of the Appellant and decide the same according to law.

28. Though it is the fact that the name of the defendant No.2 is deleted in arbitral, proceedings, still the plaintiffs have efficacious remedy before Hon'ble Arbitral Tribunal to seek temporary injunction as sought in this proceedings. because it is the pleading of the plaintiff and also appears from plain reading of suit agreement that by virtue of this agreement defendant No.1 not derive any right or interest in the suit property and same agreement is more in nature of Joint Venture. Considering above discussion in my humble view whereas the parties have agreed the forum of Hon'ble Arbitral Tribunal. They have to move the Hon'ble Arbitral Tribunal for such relief. In fact to approach to Hon'ble Tribunal for sought relief is efficacious remedy available with the plaintiffs. So considering this aspect,the earlier two rounds of proceedings and above referred order of Hon'ble High Court it is difficult to hold that the plaintiffs have prima facie case to obtain temporary injunction in this proceedings and that balance of convenience also tilts in favour of the plaintiff. As the efficacious remedy is available with the plaintiffs before Hon'ble Arbitral Tribunal it also cannot be hold that the plaintiff will suffer irreparable loss if temporary injunction as claimed is not granted. Hence I recorded answer against point No. 1 to 3 in negative.

15. The lower appellate Court, as is obvious from the above quoted observations, has rejected the application for temporary injunction pending the appeal, only on technicalities and on the ground of alternative remedy to approach the Arbitral Tribunal as well as the rejection of temporary injunction in the first suit. The agreement dated 1.1.2002 is an agreement of joint venture and the Respondent no.2 is a builder-developer and not an agent of Respondent no.1. Clauses 06 and 07 of the said agreement read as under:

> . "06. The consideration for allowing the party Second part to carry out further development on the said property is that the party of first part shall have right to share 40% of the sale proceeds on sale of each flat, shop etc., and balance 60% shall belong to the party Second part. All the flat agreement shall be jointly signed by party of first part and by party of Second part and confirming party. The collection of sale proceeds of flats, shops etc., shall be divided in the aforesaid percentage i.e. 40% to the party of first part and 60% to the party of second part. This sharing shall be done at stage of each and every collection.
>
> . 07. In addition to consideration referred above, party of second part have to pay Rs.40 lakhs as cash consideration. Out of this Rs.40 lakhs, party of second part is paying Rupees One Lakh alongwith this indenture (which party of first part admits an acknowledges).

> Balance of Rs.39,00,000/- will be payable as per mutual understanding."

. Thus an independent right has been created in favour of Respondent no.2 to develop and bring up the construction on the larger plot No.A-8 by investing the entire construction cost. 40% of the income would go to the Respondent no.1 and balance of the 60% would go to Respondent no.2. The Respondent no.2 was sought to be impleaded as a necessary party before the Arbitral Tribunal and the Tribunal directed to delete the said Respondent no.2 from the proceedings. This order has received finality. If the Respondent no.2 is not a party to the arbitral proceedings, the relief of temporary injunction based on the challenge to the agreement dated 1.1.2002 cannot be laid before the Arbitral Tribunal and therefore, the lower appellate Court fell in gross error in holding that such a remedy of seeking temporary injunction is available to the Petitioner before the Arbitral Tribunal.

. The rejection of the prayer for temporary injunction in Special Civil Suit No. 367 of 2002 as well as in Misc. Application No.43 of 2003 has no bearing on the proceedings initiated by filing RCS No. 468 of 2003. This Court in A.O.No. 954 of 2002 as well as A.O.No.335 of 2003 did not hold against

the Petitioner's right to seek an order of temporary injunction in respect of construction undertaken or to be undertaken on plot no.A-8 and the suit plot which is a part of the said larger plot. On the contrary, in its order dated 2.5.2003 this Court clarified that the Petitioner may approach the appropriate forum for such a relief and the appropriate forum was not named as Arbitral Tribunal.

. It was necessary for the lower appellate Court to consider the prima facie case if any, made out by the Petitioner on the basis of its challenge to the legality of the agreement dated 1.1.2002 in R.C.S.No. 468 of 2003 and not on technicalities or availability of alternative remedy.

16. In the proceedings before the Arbitral Tribunal, the substantial reliefs/claims have been set out in the following terms:

. "(a) That it be declared that (i) Agreement dated 8.4.1988 and (ii) MOU dated 10.5.2001 as modified on the same day are legal, valid, subsisting and binding upon the Repondents;

. (b) The Respondents may be ordered, decreed and directed by Arbitral Award to specifically perform the Agreement dated 8.4.1988 and sell, transfer all the rights, title and interest in respect of the suit property i.e. plot no.D-9, admeasuring about 1708-6 sq. mts. with the constructible FSI to the

extent of 2000 Sq.Mts. out of the said larger property which is situated at village Pachpakhadi, Taluka and District Thane and also within the limits of the Thane Municipal Corporation as also portion of the property bearing No.412, Hissa No.2 (p) admeasuring about 34453 Sq.Ft. FSI at village Pachpakhadi, Taluka and District Thane within the limits of Thane Municipal Corporation;

. (c) The Respondents be ordered, decreed and directed by an Award to execute conveyance and all other ancillary documents in favour of the Claimants and to carry out all their obligations under the suit Agreements and be further ordered and directed to deliver the possession of the suit property to the Claimants;

. (e) That strictly in the alternative to specific performance, the Honourable Tribunal be pleased to award and direct the Respondents or such of them as may be found liable to pay to the claimants (i) a sum of Rs.4,87,90,754.52 as damages in respect of the suit agreement no.1 and (ii) a sum of Rs.2,23,79,742.05 as damages in respect of suit agreement no.2 as set out in particulars of claim at Exhibits-L and M hereto".

17. The Petitioner has admittedly got the knowledge of the agreement dated 1.1.2002 as on 26.8.2002 for the first time and prima facie it appears that it has taken due steps to protect its claims before the Arbitral Tribunal more particularly the claims in terms of clauses (b) and (c) as reproduced hereinabove by challenging the legality and validity of the agreement dated 1.1.2002 in time after its

claims were referred to the Arbitral Tribunal. It is obvious that if the Respondent no.1 is allowed to go ahead with the construction on the basis of the agreement dated 1.1.2002 the claims in prayer clauses (b) and (c) before the Arbitral Tribunal would not survive and by this unilateral act of the Respondent no.1 in collusion with the Respondent no.2 the arbitral proceedings would be limited/restricted to the claim of monetary damages/compensation only.

. The legality or otherwise of the agreement dated 1.1.2002 would be a mixed question of facts and law and the same could be examined only in the pending RCS No. 468 of 2003. What is required to be examined is whether the Petitioner has made out a prima facie case for temporary injunction restraining any construction activity on the suit plot which is presently part of Plot No.A-8 during the pendency of the arbitral proceedings. This issue has not been examined by the lower appellate Court and the prayer for temporary injunction has been rejected on technicalities and on the basis of alternative remedy.

. There is no dispute that the plaintiff has executed a power of attorney in favour of her son on 4.5.2002 and in the said document, there is no whisper about the suit agreement dated 1.1.2002. The

Respondents have been persistently contending that the Municipal Corporation has approved and sanctioned development plan on 29.6.2001 and the construction was undertaken pursuant to the said approval. While deciding A.O.No. 335 of 2003 similar statement was made before this Court and it was noticed, after the corporation authorities were called upon to submit proof, that there was no construction commenced on plot No.A-8 or the smaller plot D-9. The order dated 29.6.2001 is in respect of plot No.A-7. There is no dispute that the construction on the plot No.A-7 is already completed but the order dated 29.6.2001 is not an order in respect of plot no.A-8 and even if it is presumed to be an order in respect of the said plot, it only says building Nos. A, B, C and D wings of ground floor plus seven floors. It is the case of the respondents that subsequently, the plan has been modified and it has been enhanced to ground plus twelve floors. The story does not stop here alone. The Commencement Certificate in respect of the construction of plot no.A-8 has been placed on record by the Petitioners and it is dated 18.3.2005. It states all three buildings as under:

1. Building No.C-1 Part stilt + 7 floors
2. Building No.C-2 Part stilt + 12 floors
3. Building No.C-3 Part stilt + 7 floors

18. The Respondents claim that third party interests have been created by signing agreements in respect of flats which are purportedly coming up on the suit property. The Petitioners claim that these are transactions by way of after thought and they are genuine transactions and in any case, they have been allegedly entered into only to defeat the relief of temporary injunction. This aspect is required to be examined by the lower Courts and at the first instance by the lower appellate Court. There is another order dated 24.10.2002 issued by the Thane Municipal Corporation and that is also in respect of plot no.A-7. In the said order in respect of plot no.A-8 it has been stated as under:

> . "For the construction to be undertaken on plot no.A-8 permission will be granted only after the Nala construction is completed".

. This doucment also shows that as on 29.6.2001 there was no permission granted for the construction to be undertaken on plot No.A-8.

19. There is no dispute that the Petitioner had paid an amount of Rs.24 lakhs to the late husband of Respondent no.1 pursuant to the Agreement dated 8.4.1988 for purchase of plot No.D-9 admeasuring 1708.6 sq.mts. and on amalgamation of the plots pursuant to the requirements of the T.M.C. the said

plot has merged with the larger plot No.A-8 admeasuring 5135.63 sq. mts. The Agreement dated 1.1.2002 which is under challenge in RCS No. 468 of 2003 is in respect of the larger plot No.A-8 and thus, the area of the plot covered by the Agreement dated 8.4.1988 is alos a subject matter of the Agreement entered between the respondents while his claim independently had arisen much earlier on the said plot. It is not the case of the Respondent no.1 that at any time during the lifetime of her husband, the Agreement dated 8.4.1988 was terminated and even when the Memorandum was signed on 10.5.2001, it was not even an allegation of the Respondent No.1 that the Agreement dated 8.4.1988 did not subsist. The Petitioner's claim for specific performance of the Agreement dated 8.4.1988 would become unuser. In any case, it would automatically stand amended as pending before the Arbitral Tribunal only for claiming compensation. In addition, if the Petitioner is not protected pending RCS No. 468 of 2003 would become infructuous as the declaration obtained subsequent to the completion of the building by the Respondent No.2 would defeat the suit itself. The challenge raised in RCS No. 468 of 2003 arises from the Petitioner's legal claim for specific performance of the Agreement dated 8.4.1988 and this specific performance cannot be limited per se to claim the compensation. The record also prima facie shows that the Respondent No.1 has

proceeded to sign the Agreement dated 1.1.2002 with Respondent No.2 without the knowledge and consent of the Petitioner. Thus, the Petitioner has made out a strong prima facie case for a temporary injunction pending the decision of the lower Appellate Court in Misc. Civil Appeal No. 191 of 2003.

20. In the premises, the petition succeeds partly. The impugned order passed by the lower appellate Court in Misc. Civil Appeal No. 191 of 2003 is hereby quashed and set aside and the application filed for temporary injunction at Exh.18 in the said appeal, is hereby allowed by directing the Respondents to maintain status quo in respect of the construction that has commenced or is yet to be commenced on the area admeasuring 1708.6 sq. mts. from plot no.A-8 (an area of 2000 Sq.Mts. FSI). The appeal is directed to be heard and decided on its own merits as expeditiously as possible and in any case, within a period of three months from the date of the appearance of the parties before the lower Appellate Court and the order of status-quo to operate till then.

21. The parties to appear before the lower Appellate Court on 9.5.2005.

22. Rule made absolute accordingly with no order as to costs.

(B.H. MARLAPALLE, J.)